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No. 82-183

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JANE DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. Respondent contends (Br. in Opp. 1) that her answers to the questions that the government wishes to address to her before the grand jury[1] "would result in testimony directly adverse to her spouse" and that her invocation of the privilege against adverse spousal testimony is justified for that reason. This claim, which is raised for the first time in this Court, is wholly without merit. The questions posed to respondent, which are reproduced in the Appendix, *infra*, 1a-4a, relate very specifically to the actions of respondent herself and two other individuals on particular dates. None of the questions refers to respondent's

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[1]For purposes of the district court hearing on respondent's claim of marital privilege and illegal interception of an oral communication, counsel stipulated that she would have refused to answer questions 2 through 44 of a prepared list of questions. See C.A. App. 9a, 23a-26a.

husband, and none calls for any mention of him. In fact, as respondent is aware, her husband was not even in the vicinity of the particular actions that are the subject of the questions.

Respondent points out (Br. in Opp. 1) that the contents of a tape recorded conversation between herself and the third-party target of the grand jury include references adverse to her spouse. That is true, but it is irrelevant to the questions raised in the petition. As respondent notes (*id.* at 1 n.1), the district court suppressed all questions relating to the tape recorded conversation on the independent ground that they were the product of an illegal interception of an oral communication (see C.A. App. 150a-151a), and that ruling was not challenged on our appeal. Thus, even if the government had planned to use the tape of the conversation against respondent's husband, as well as against the third party target, any questioning about the tape in this proceeding is now foreclosed. There is simply no way in which respondent's answers to the particular questions that are at issue here could constitute testimony directly adverse to her husband.[2]

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[2]The statement in respondent's brief that "it was found respondent's testimony would implicate [her husband]" (Br. in Opp. 2) is incorrect. Neither court below made any such finding. Both based their holdings on the government's acknowledgment that respondent's testimony was sought in order to obtain an indictment against a third-party, who might later elect to testify against respondent's husband before a different grand jury. See Pet. App. 3a-4a, 31a-32a.

Respondent appears to suggest (e.g., Br. in Opp. i, 1, 7) that the government's sole purpose in seeking her testimony is to obtain an indictment against her husband. This is not the case. Our primary interest is in obtaining an indictment of the third party target, who is not entitled to the benefit of respondent's marital privilege. However, we believe we are within our rights in declining to grant the derivative use immunity that respondent seeks for her husband, since any subsequent use of the third party's testimony against the husband would be too attenuated to fall within the protection of the marital privilege.

2. Respondent also argues (Br. in Opp. 3-4) that her testimony is not really essential to the grand jury investigation because the government seeks merely to corroborate testimony of her co-defendant implicating the third-party target. In support of this argument respondent cites a footnote in an article written by the Assistant United States Attorney who handled the case below. However, nothing in the article or in any other source cited by respondent supports the contention that respondent's testimony was not crucial to the government's case. Corroboration of disputed facts often is essential, particularly when, as in this case, the only other evidence of a fact is provided by an individual who previously has entered into a plea bargain with the government. Caution on the part of the prosecution in such cases is not only commendable; it is vital to the government's chances for success. Indeed, in the very passage of the article quoted by respondent (Br. in Opp. 3), the prosecutor termed her testimony "an essential condition precedent to presentment of an indictment" against the third party target of the grand jury. Br. in Opp. 3-4, quoting Purdy, *The Marital Privilege: A Prosecutor's Perspective*, 18 Crim. L. Bull. 309, 314 n.37 (1982). To this day the government has been unable to obtain an indictment of the third party target; the reason is that respondent has continued to invoke the marital privilege and to refuse to testify against him. As we have suggested in our petition (Pet. 6-16), this case is a clear example of the harm to law enforcement that is likely to result from application of the court of appeals' overly expansive view of the marital privilege.

3. While not disputing the existence of a conflict among the circuits on the issue of the availability of the marital testimonial privilege to co-conspirator spouses, respondent suggests (Br. in Opp. 14-15) that questions concerning application of the marital privilege are more appropriately resolved by the lower courts on a case-by-case basis and that

this Court should refrain from resolving the conflict for that reason. Of course, case-by-case determination by the lower courts will be the practice in most cases involving invocation of the marital privilege. However, the question of the availability of the privilege in the co-conspirator context is a discrete and important one that is fully ripe for this Court's consideration. As for the "fruits" issue, which in some instances might be merely a matter of line drawing appropriately left to the lower courts, we urge that it is desirable and entirely appropriate for this Court to provide guidance to the lower courts in the present case, in which the courts below have expanded the privilege far beyond its traditional scope and far beyond the limits suggested by "reason and experience."[3]

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[3]Respondent suggests (Br. in Opp. 10) that it would be preferable to await further appellate decisions involving application of the marital privilege because this Court stated the purpose of the privilege so recently in *Trammel* v. *United States*, 445 U.S. 40 (1980). However, the purpose of the privilege was recognized long before *Trammel*. Moreover, as the cases we discussed in our petition suggest, the courts of appeals have had ample recent experience, both before and after *Trammel*, with assertions of the marital privilege, including invocation of the privilege before a grand jury. There is no reason to delay consideration of this case in which the courts below so clearly departed from this Court's admonition in *Trammel* (*id.* at 50) that the privilege should be strictly construed.

Respondent also argues (Br. in Opp. 13) that the government has not made a sufficient showing that she and her husband were engaged in joint criminal activity. We do not dispute that the government should be required to make some preliminary showing in order to justify application of a co-conspirator exception. Whatever that showing must be, it surely has been made in this case, in which respondent has pleaded guilty to participation in a conspiracy and the questions the government wishes to ask her relate only to that conspiracy.

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

NOVEMBER 1982

DOJ-1982-11

APPENDIX

PROPOSED QUESTIONS—[JANE DOE] *

1. [Respondent did not refuse to answer question 1, which merely required her to confirm her guilty plea.]
2. In , did you have a discussion with [Samuel Smith] about obtaining methamphetamine from [Richard Roe]?
3. In , did you ride in a car with [Samuel Smith] to a location in New Jersey where you waited while he went to another location to obtain methamphetamine?
4. On that occasion, did you wait at a restaurant called "Bogarts" while [Samuel Smith] went to the second location?
5. Was the second location the residence (if not, what was it) of [Richard Roe]?
6. On that occasion in did [Samuel Smith] obtain approximately 1 pound of methamphetamine from [Richard Roe]?
7. To your knowledge, what was [Richard Roe] to obtain (or what did he obtain) in exchange for providing the one pound of methamphetamine?

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*In our petition we used the fictitious names "Jane Doe" and "John Doe" to refer to respondent and her husband (see Pet. 1 n.1), and that practice is continued here. Other fictitious names used in this appendix are "Richard Roe" (the third-party target of the grand jury), "Samuel Smith" (respondent's co-defendant, who also pleaded guilty), and "James Jones" (an informant). The question in this Appendix are taken from C.A. App. 23a-26a.

8. Was the arrangement that one gallon of P2P would be exchanged for the pound of methamphetamine?

9. Did [Samuel Smith] walk from the location where you waited to the place where he met [Richard Roe]?

10. How long was [Samuel Smith] gone before he returned with the methamphetamine?

11. What was [Smith] carrying the methamphetamine in?

12. Who drove the car from that location and where did you go?

13. Did [Samuel Smith] give you that one pound of methamphetamine on that occasion?

14. When did he give it you?

15. On or about in Southampton, PA did [Samuel Smith] deliver 14.2 grams of the aforementioned methamphetamine to [James Jones] for $450.00?

16. Were you present on that occasion? Where exactly were you?

17. After [Smith] gave [Jones] the 14.2 grams (net weight) did [Samuel Smith] ask you to get the rest of the methamphetamine? Did you do so, and where did you get it from?

18. Subsequently, on that date, in the same location, did you give approximately 16.58 grams (net weight) of methamphetamine to [Samuel Smith] who then delivered it to [James Jones] for approximately $450.00? Was that methamphetamine part of the one pound [Samuel Smith] had obtained from [Richard Roe]?

19. On or about , did [Samuel Smith] sell [James Jones] 116.5 grams (net weight) of methamphetamine for $3,200.00? Where did this transaction take place? Were you present when this transaction took place? Was this methamphetamine part of the one pound [Samuel Smith] got from [Richard Roe] as described earlier?

20. On or about at a location in Southampton, Pennsylvania, did you give [Samuel Smith] a plastic bag containing 6.28 grams (net weight) of methamphetamine which he sold to [James Jones] in your presence in exchange for $240.00 which [Samuel Smith] turned over to you? Where was that location? Was that methamphetamine part of the one pound [Samuel Smith] had obtained from [Richard Roe]? If not, where did that methamphetamine come from?

21. On or about , did you transport approximately 2 pounds (gross weight) of methamphetamine to your residence at?

22. From whom did you obtain the methamphetamine, and in exchange for what?

23. Did you obtain that methamphetamine from [Richard Roe]?

24. Did [Roe] call you about this methamphetamine, and did you call [Samuel Smith] and ask him to accompany you?

25. Did [Smith] wait for you while you obtained the methamphetamine from [Roe]?

26. Where did he wait for you? (Was it near the first circle south of Route 130 in Gloucester, N.J.?)

27. How long after you dropped [Smith] off did you return to pick him up? Did you return to his apartment?

28. What type of container was the methamphetamine transported in and who carried it?

29. When you arrived at [Smith's] apartment did he take the two pounds of methamphetamine from you? Did you subsequently call him to obtain all or part of it back?

30. Did you proceed to his apartment where [Smith] gave you one pound of the methamphetamine? Did he express an intent to sell the other pound?

31. On or about , did [Samuel Smith] sell [James Jones] approximately 7.4 grams (net weight) of methamphetamine for $250.00? Were you present during that transaction? If not, were you aware of that transaction? Was that methamphetamine part of the two pounds of methamphetamine which you obtained from [Roe]?

32. On or about , was a location in the Eastern District of Pennsylvania searched where [Smith] was present in which 358.3 grams (net weight) of methamphetamine was found? Were you present on that occasion? Was that methamphetamine part of the two pounds of methamphetamine which you obtained from [Roe]?

* * * * *

[Intervening questions related to the tape recorded conversation and were struck down as the product of an illegal interception of an oral communication.]

44. To your knowledge, from whom did [Richard Roe] obtain the previously described methamphetamine? When was it obtained and at what location?